

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CHARLES DORSEY

PLAINTIFF

vs.

Civil Action No. 4:98CV74-D-A

AUTO ZONE, INC., RONALD P.
UNDERBERG and JESSE McGEE

DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the plaintiff to remand this cause to the Circuit Court of Washington County, Mississippi. Finding that the motion is well taken, the court shall grant the motion and return this matter to state court for ultimate resolution.

I. Factual and Procedural Background

This action was originally commenced on November 3, 1997, by the plaintiff in the Circuit Court of Washington County, Mississippi. On March 23, 1998, the defendants filed their petition for removal of the action to this court alleging that the defendant Jessie McGee had been fraudulently joined in this action for the sole purpose of defeating diversity jurisdiction. Plaintiff responded with this motion to remand on March 30, 1998¹.

The accident in question occurred on August 11, 1997, when the plaintiff visited Auto Zone in Greenville, Mississippi. Plaintiff is a paraplegic and is confined to a 450 pound

¹ 28 U.S.C. § 1446 (b) provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt of the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . .

28 U.S.C. § 1446(b). It appears that the thirty day requirement was not met in this case. However, since such defect was not raised by the plaintiff and is not jurisdictional, the court shall deem it waived.

wheelchair. Plaintiff states in his complaint that his personal assistant along with Jesse McGee, an employee of Auto Zone, helped him into the store which had no ramps or other facilities available for handicapped persons. Upon his exit from the store, the wheelchair fell over on top of the plaintiff and injured him.

The plaintiff alleges a cause of action against Defendants, Auto Zone (lessee of the property) and Ronald Underberg (property owner) for failing to maintain the premises in a reasonably safe condition by not complying with applicable statutes and laws regarding the handicapped. He also alleges a cause of action against Jesse McGee (employee of Auto Zone) for assisting him into the store and then negligently failing to assist his departure from the store. The defendants' removal of this action is based on the premise that Jesse McGee had no duty to assist the plaintiff exiting the store, and accordingly, the plaintiff cannot possibly have any claim against defendant McGee in this action.

II. Standard of Review

The Judiciary Act of 1789 provides in pertinent part, "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending . . ." 28 U.S.C. 1441(a). Original jurisdiction exists "where the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between . . . citizens of different states . . ." 28 U.S.C. §1332(a). The phrase "citizens of different states" requires complete diversity. Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd., 99 F.3d 746, 751 (5th Cir. 1996). Therefore, should a plaintiff be a resident of Mississippi, no defendant can be a resident of Mississippi. In the case at hand, the plaintiff and one defendant are Mississippi residents. However, this fact will not

destroy diversity jurisdiction if the Mississippi defendant was fraudulently joined in order to defeat diversity. Rodriguez v. Sabatino, 120 F.3d 589, 591 (5th Cir. 1997).

A party invoking the removal jurisdiction of the federal courts bears a heavy burden. Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir.), cert. denied, 498 U.S. 817, 111 S.Ct. 60, 112 L.Ed.2d 35 (1990). “To prove that non-diverse parties have been fraudulently joined in order to defeat diversity, the removing party must demonstrate either ‘outright fraud in the plaintiff’s recitation of jurisdictional facts,’ Burden v. General Dynamics Corp., 60 F.3d 213, 217 (5th Cir. 1995), or that ‘there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court.’ Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 259 (5th Cir. 1995).” Rodriguez v. Sabatino, 120 F.3d 589, 591 (5th Cir. 1997).

Defendants are alleging the second rule is at issue here, and in that regard, this court “evaluates all of the factual allegations in the plaintiff’s state court pleadings in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff” and “examines relevant state law and resolves all uncertainties in favor of the nonremoving party.” Green v. Amerada Hess Corp., 707 F.2d 201, 205-06 (5th Cir. 1983), cert. denied, 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166 (1984).

In the evaluation of a claim of fraudulent joinder, this court need not reach a conclusion as to whether the plaintiff will actually or even probably prevail on the merits of the claim. The undersigned determines if there exists a possibility that the plaintiff has stated a claim against the defendants. Burden v. General Dynamics Corp., 60 F.3d 213, 216 (5th Cir. 1995). “Where the plaintiff’s complaint is devoid of any factual allegations suggesting a basis for recovery against a

particular defendant, there can be no ground for concluding that a claim has been stated.” Doe v. Cloverleaf Mall, 829 F. Supp. 866, 870 (S.D. Miss. 1993).

III. Possibility of Recovery Against Defendant McGee

In his complaint, Plaintiff charges that the defendant McGee “while in the course and scope of his employment with Auto Zone, assisted Plaintiff into the Auto Zone but negligently failed to assist his departure from the store. This negligent act proximately contributed or caused Plaintiff’s injuries.” Plaintiff’s Amended Complaint ¶4.

A basic premise in Mississippi negligence law is that a plaintiff must establish the existence of a legal duty on the part of the defendant. Strantz v. Pinson, 652 So.2d 738, 742 (Miss. 1995); May v. V.F.W. Post #2539, 577 So. 2d 372, 375 (Miss. 1991); see also Hartsfield v. McRee Ford, Inc., 874 S.W.2d 148, 150 (Tex. 1995) (threshold inquiry in negligence action is determining whether defendant owed duty to plaintiff). “The duty of ‘reasonable care’ is not absolute care; it is qualified. ‘Reasonable’ is defined as ‘fair, proper, just, moderate, suitable under the circumstances.’” Black’s Law Dictionary 1265 (6th ed. 1990). ‘Reasonable care’ is defined as ‘that degree of care which a person of ordinary prudence would exercise in the same or similar circumstances.’” Stelly v. Barlow Woods, Inc., 830 F. Supp. 936, 941 (S.D. Miss. 1993). Defendants argue Mississippi law does not create a duty on the part of an employee such as McGee to provide some type of unspecified assistance in an area outside the store. This argument, however, overlooks an area of negligence law which imposes a limited duty to avoid affirmative acts which make a person’s situation worse by placing them in a more dangerous situation.

A tortfeasor is accountable only to those to whom a duty is owed. Id. As it is the court’s function to determine whether a duty exist, such examination includes several factors, including,

most notably, foreseeability. Duty is decided upon by the scope of the risk that never, not merely possible but probable. . .” Id. at 68.

The law provides that even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care. W. Page Keeton et al., *Prosser and Keeton on Torts*, p.378 (5th ed. 1985). Restatement of Torts 2d §324 provides, “One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor’s charge or (b) the actor’s discontinuing his aid or protection, if by so doing, he leaves the other in a worse position than when the actor took charge of him.” Restatement of Torts § 324. See Harris v. USA, 718 F.2d 654, 658 n.6 (4th Cir. 1983) (“It is true, of course, that once Kemp intervened to assist the boys, he came under a duty to exercise reasonable care to secure their safety and not to leave them worse off than before by discontinuing his aid.”); State Dept. of Highway Safety v. Kropff, 491 So.2d 1252, 1255 (Fla. 1986) (officer had duty to exercise reasonable care with regard to any action that he undertook); Parvi v. City of Kingston, 41 N.Y.2d 553, 558, 362 N.E.2d 960, 964 (1977).

Upon review of the pleadings and affidavits presented before the undersigned, there exists a possibility that the plaintiff may recover against defendant McGee. Although McGee denies offering any assistance to the plaintiff in his affidavit, the plaintiff contends that McGee assisted him into the store. Accepting the factual allegations in the light most favorable to the plaintiff, it could be determined that McGee’s assistance and then lack of assistance upon leaving the store caused or contributed to the plaintiff’s injuries. It is foreseeable the store. Again, there may be no duty to help a handicapped customer into the store, but once assistance is rendered, a limited duty

may arise to make certain the customer is protected from the danger or peril of being helped off of the premises. “[I]f the defendant does attempt to aid him, and takes charge and control of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility.” *Prosser, et al.* at 378. Because the plaintiff in this case has demonstrated the existence of facts which could reasonably be viewed as supporting his claim against the resident defendant, the motion to remand shall be granted.

IV. Conclusion

As this court finds that there exists the possibility of recovery against the non-diverse defendant McGee, this court does not possess jurisdiction over this cause by virtue of the citizenship of the parties involved. Remand of this action is proper, and this court shall grant the plaintiff’s motion to remand.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of May, 1998.

United States District Judge